

Hopeless cases: race, racism and the ‘vexatious litigant’

Didi Herman

Kent Law School, University of Kent

Abstract

In this article, I explore how courts respond to vexatious litigants. These are individuals who have been made the subject of a s.42 order under the Supreme Court Act 1981. Their names are added to an existing list of ‘vexatious litigants’, published by the Court Service and the Law Gazette. Vexatious litigants are prevented from launching any further legal actions without the express permission of a judge. I first set out a brief history of the concept of vexatious litigation in England, and then explain the governing legal framework. The second section considers the literature in the area, a short third section discusses some case histories, and the fourth and main part of the article explores some questions raised by observing judicial narratives of ‘vexatiousness’ in decisions involving not-white and/or immigrant litigants. I argue that we can understand vexatious litigation as being about a passionate search for justice, as opposed to or at least as well as an ‘obsession’. That, rather than suffering from ‘delusions’, many vexatious litigants may, instead, be very well aware of ‘reality’ but simply not prepared to accept or succumb to it. I argue that while vexatious litigants appear to be unable to ‘get over’ their old injuries, we can reconceptualise these dynamics in a way that acknowledges how such melancholic attachments can underpin human agency and social change. I also suggest that it is worth reversing the gaze to consider the emotional worlds of the judges involved in these cases, and the psychic investments of the legal system itself.

Introduction

In 1995, Paula Douglas was studying at the College of Law in Chester when her instructor chose to use the phrase ‘nigger in the woodpile’ in class. Ms Douglas went on to fail her LPC exams, and blamed her failure on the trauma caused by what a judge later referred to as ‘that unfortunate incident’. She pursued legal action against the College of Law, the Law Society and firms of solicitors in at least forty-one unsuccessful separate proceedings, all alleging racial discrimination. Described by the judge as ‘obsessive’, and as someone who ‘will not take “no” for an answer’, Ms Douglas was declared a vexatious litigant in 2006.¹

Akena Adoko, in the course of his career, headed Uganda’s first intelligence agency, co-organised a coup that led to a counter-coup bringing Idi Amin to power, and practised in Uganda and England as a barrister. In 1992, some years after moving to England, Mr Adoko experienced what he believed to be racist treatment by the Law Society. He went on to sue the Law Society, along with various lawyers and judges involved in the cases, in an escalating series of actions. He also wrote a book entitled

For helpful comments on an earlier draft, I would like to thank: Davina Cooper, Emily Grabham and Richard Moorhead. Thanks also to Michael Freeman and the IJLC referees.

¹ *AG v. Douglas (No2)* [2006] EWHC 1982. All persons named as ‘vexatious litigants’ in this article appear in the public list published by the Court Service, see further below.

The Most Corrupt British Judges (Adoko, 2005). In 2004, Mr Adoko had the distinction of being one of eight people declared ‘vexatious litigants’ by the English courts that year.²

Krishan Arora began his wave of litigation in 1990, after a court reduced an award he had won and ordered him to pay the costs of the appeal. Mr Arora, according to one judge, believed there was ‘institutional racism in the courts’, and would ‘never take “no” for an answer’. He was declared a ‘vexatious litigant’ in 2001.³

In this article, I explore how courts respond to vexatious litigants. These are individuals who have been made the subject of a s.42 order under the Supreme Court Act 1981. Their names are added to an existing list of ‘vexatious litigants’, published by the Court Service and the Law Gazette.⁴ Vexatious litigants are prevented from launching any further legal actions without the express permission of a judge. Most orders under s.42 are for an unlimited time. I explain the process in more detail below.

I first became aware that certain individuals were declared by the courts to be ‘vexatious’ while undertaking previous work on Jews, Jewishness and judicial discourse, when I discovered that one of my Jewish litigants had been declared ‘vexatious’ in 1997.⁵ I wondered at the time whether there was any connection between perceived vexatiousness and ethnicity, and, as I will argue here, this intuition seems to have been proven correct.

To my surprise, I have found that there is almost no UK legal literature on the subject of vexatious litigants at all, much less any attempt to undertake an analysis of the area drawing connections between vexatiousness and race, ethnicity or even gender for that matter. As I explore further below, there is a small literature on ‘querulous paranoia’ in psychology, drawing links between repeat litigation and ‘psychosis’. There is also some Australian and American legal literature on various frameworks deployed in those countries to prevent individuals from launching repeat actions. However, there is no sustained analysis of the area in the UK literature (see further below). This article, then, provides a mapping of vexatious litigation in England, and then explores one dimension – race and racism – raised by this mapping.

People declared to be vexatious litigants (VLs) can broadly be characterised as falling into one of two groups: those with histories of mental health problems who launch multiple legal actions against diverse targets; and those whose initial legal action, for example (one that recurs often) a complaint of discrimination under the Race Relations Act (RRA; now incorporated into the Equality Act 2010), was resolved against them, and who then attempt to carry on with aspects of that complaint in various ways. A significantly disproportionate number of VLs are non-white men (see further below), and several are lawyers (or ex-lawyers or law students).⁶

I first set out a brief history of the concept of vexatious litigation in England, and then explain the governing legal framework. The article’s second section considers the literature in the area, a short third section discusses some case histories, and the fourth and main part of the article explores some questions raised by observing judicial narratives of ‘vexatiousness’ in decisions involving not-white/immigrant litigants. I argue that we can understand vexatious litigation as being about a passionate search for justice, as opposed to or at least as well as an ‘obsession’. That, rather than suffering from ‘delusions’, many VLs may, instead, be very well aware of ‘reality’ but simply not

2 AG v. Adoko [2004] EWHC 1409 (Admin). Adoko died in 2010; some details of his life in Uganda can be found in ‘Akena Adoko is Dead’, *Uganda Record*, 20 February 2010, and ‘Independence-era Spy Chief Adoko is Dead’, *Daily Monitor*, 9 January 2010.

3 AG v. Arora [2001] EWHC Admin 594.

4 See www.justice.gov.uk/guidance/courts-and-tribunals/courts/vexatious-litigants/index.htm.

5 AG v. Brookner (unreported, 18 November 1997).

6 For example, Zainab Abiola, Akena Adoko, Paula Douglas, Andre Salakov, Alex Scarr and Bridget Wray had all practised or studied law.

prepared to accept or succumb to it. I argue that while VIs appear to be unable to ‘get over’ their old injuries, we can reconceptualise these dynamics in a way that acknowledges how such melancholic attachments can underpin human agency and social change. I also want to suggest that it is worth reversing the gaze to consider the emotional worlds of the judges involved in these cases, and the psychic investments of the legal system itself.

The idea and regulation of vexatious litigation

As Simon Smith has noted (1989), the idea of certain legal actions being ‘frivolous’, repetitive and without merit has a long history.⁷ Common law regulation is apparent from at least the mid nineteenth century, with the first English statute expressly regulating ‘vexatious’ litigation enacted in 1896.⁸ According to Smith (1989) and also Michael Taggart (2004), the instigator for this legislation was the forty-eight legal actions of one man, Alexander Chaffers. Over the course of a 30-year period, Mr Chaffers had launched a series of ‘unmeritorious’ actions against judges, MPs and the Archbishop of Canterbury, amongst others. The conduct of such litigants was deemed to be an abuse of process, leading to a waste of time and resources, as well as the potential victimisation of persons targeted by the vexatious litigant. In 1897, Mr Chaffers was the first person declared to be ‘vexatious’ under the new Act.

Today, legal behaviour deemed vexatious continues to be regulated by common law and statute, including what was known as a *Grepe v. Loam* order but are now called ‘civil restraint orders’.⁹ These orders last for two years and prevent a litigant from issuing any further applications (within the same set of legal proceedings or beyond) without first obtaining the court’s permission to do so. The names of individuals with such orders issued against them are on the public record.¹⁰ Civil restraint orders can also be extended to apply further restrictions.¹¹ In addition, s.33 of the Employment Tribunals Act allows EATs to make a ‘restriction of proceedings order’ against litigants deemed to be abusing the employment tribunal process.¹²

Neither of these mechanisms, however, results in a person’s name being added, potentially forever, to the list of official ‘vexatious litigants’ maintained by the Court Service. Only a s.42 order under the Supreme Courts Act 1981 has this effect. This provision permits specific litigants to be referred to the Office of the Attorney General (A-G). Once such a referral has occurred, the Treasury Solicitor will launch an investigation into the litigant’s behaviour in the courts. If a s.42 order is deemed to be warranted, the Treasury Solicitor will make an application to the Divisional Court under s.42. The application will be heard by at least two High Court judges, one of whom will be from the Court of Appeal.¹³

In determining whether to declare a litigant vexatious or not, the Court will consider a number of factors. The leading case is *Barker*, where Bingham LCJ summarised what he believed to be the elements of vexatiousness:

7 Smith (1989) notes an Elizabethan statute that attempted to prevent such actions.

8 Vexatious Actions Act 1896.

9 *Grepe v. Loam* (1888) L.R. 37 Ch. D. 168.

10 www.justice.gov.uk/guidance/courts-and-tribunals/courts/civil-restraint-orders/civil-restraint-orders.htm.

11 These orders are described in detail in *Bhamjee v. Fordick* (No 2) [2003] EWCA Civ 1113. For reasons of space and due to their somewhat lesser severity, I do not consider cases involving civil restraint orders in this article, although they are more common than ones under s.42. See also: http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_parto3c.htm.

12 Although this article focuses on those persons declared ‘vexatious’ under s.42 of the Supreme Courts Act, there are interesting parallels with s.33 determinations to which I will draw attention.

13 See www.attorneygeneral.gov.uk/AboutUs/Pages/VexatiousLitigants.aspx and www.tsol.gov.uk/Publications/Scheme_Publications/vexatious_litigants_policy.pdf.

“Vexatious” is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process (para.19) ... From extensive experience of dealing with applications under section 42 the court has become familiar with the hallmark of persistent and habitual litigious activity. The hallmark usually is that the plaintiff sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, thereby imposing on defendants the burden of resisting claim after claim; that the claimant relies on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, in actions against successive parties who if they were to be sued at all should have been joined in the same action; that the claimant automatically challenges every adverse decision on appeal; and that the claimant refuses to take any notice of or give any effect to orders of the court. The essential vice of habitual and persistent litigation is keeping on and on litigating when earlier litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop.’¹⁴

In reading *Barker* and the other VL cases, it is apparent that there are a number of elements to the offence of vexatiousness: the litigation contains no recognised legal claim; a utilitarian calculation concludes the costs of litigation (particularly to ‘innocent’ parties) hugely outweigh any benefits; the legal system is being used for an improper purpose, including successive attempts to relitigate the same matter; irrationality; and the refusal to take ‘no’ for an answer.¹⁵

It is perhaps worth noting that in one of only two cases where s.42 orders appear to have been refused, the judges found the litigant to have done no more than what was normal in the business world; his attempts to exploit the legal system to his advantage were seen as part of the cut and thrust of capitalist relations. Perhaps unsurprisingly, this is also one of the very few s.42 cases where the litigant had legal representation. According to the Court in this case, ‘the borderline between taking advantage of events ... and instituting vexatious proceedings without any reasonable ground has not been crossed’.¹⁶ As nearly every s.42 order is granted, it appears that once the A-G has taken what is clearly viewed as an extreme step – applying for the order in a specific case – the courts almost never refuse it.

The literature

Much of the writing on the topic of vexatious litigants is in the field of psychiatry. With one exception I will note, the bulk of this literature, unsurprisingly, treats such behaviour as pathological (i.e. Rowlands, 1988). For example, in a piece published in *Behavioural Sciences and the Law* in 2006, two forensic psychiatrists argue that vexatious litigants must be ‘managed’ by mental health professionals: ‘Those caught up in a querulous pursuit of their notion of justice are

¹⁴ *AG v. Barker* [2000] 1FLR 759, para. 22.

¹⁵ In s.42 cases, two other judgments are frequently cited for further guidance. *AG v. Vernazza* [1960] A.C. 965 is used as authority for judges looking into ‘the whole history of the matter’, and *AG v. Jones* (23 March 1989, CO/529/88), for the proposition that it is not appropriate in VL cases to revisit the ‘merits’ of the litigant’s claims. As I shall discuss later in the article, this last point would appear to contradict Lord Bingham’s first – that a significant element of vexatiousness is that there is no legal basis for the claim.

¹⁶ *AG v. Flack* [2001] A.C.D. 67, para. 25.

amenable to management that can ameliorate their suffering and reduce the disruption they create' (Mullen and Lester, 2006, p. 333). In another example, Robert Goldstein states that 'litigious paranoids contribute to the inundation of already overcrowded court dockets with all manner of litigation calculated to ensnare and ruin their enemies' (1987, p. 304). They do this in order to 'act out their own internal psychopathologic needs' (p. 314).

Others suggest that antipsychotic medication can help alleviate these symptoms: 'long term treatment with a small dose of high-potency anti-psychotic drug, such as pimozide, may result in remission, preventing further disruption in the patient and his/her family's life and easing the burden on authorities dealing with the repeated senseless complaints' (Ungvari, Pang and Chiu, 1995, p. 73; also Ungvari and Hollokoj, 1993). Fundamental to these psychiatric approaches is the writer's belief that such litigants are suffering from 'paranoid delusions'. Their sense of justice is misplaced due to their inability to accept reality. As Ian Freckelton has put it:

'Institutional barriers and technicalities that would normally be effective barriers become subsumed in the paranoid's mind into conspiracies, hatched to prevent the complainant from establishing his or her rights. Righting the imagined wrong becomes a cause, a moral crusade into which all manner of people can be drawn if they are not watchful ...' (1988, p. 129)

That the wrong is 'imagined' is crucial to these perspectives.¹⁷

In a rare departure from these assumptions, Olli Stålström (1980) suggests that the diagnosis of 'querulous behaviour' may disguise the presence of legitimate complaints. By labelling individuals as paranoid and delusional, mental health professionals turn what may be the experience of 'real' harm into an irrational 'feeling'. As I go on to explore, my analysis of s.42 orders suggests Stålström may be right. The question of whether 'paranoid persons' launch vexatious litigation, or whether the experience of litigation creates 'paranoid persons', remains an open question.

Within legal scholarship, aside from Smith (1989) and Taggart's (2004) historical pieces (and the former is largely about the Australian state of Victoria), there is very little UK legal literature on vexatious litigants. John Sorabji has written a helpful but short piece describing the at times convoluted law surrounding 'abuse of process' (2005), Alan Murdie suggested in *The New Law Journal* that VLs might be suffering from 'de Clerambault syndrome' (2002),¹⁸ and O'Doherty notes that vexatious litigation is in need of control (2002).¹⁹ In addition to Smith's piece, there is a small Australian and American literature on vexatious litigation that includes pieces by Kirby (2009), Lester and Smith (2006), Colby (2000), Schiller and Wertkin (2000), and Stauber (2008). While Kirby's work is unusually sympathetic to the vexatious litigant, the rest of the field, for the most part, treats vexatious litigation as a pernicious vice in need of serious regulation (but see Smith, 2007).

In the UK, the socio-legal scholarship on 'civil justice' contains some relevant insights. However, this work does not appear to give much consideration to the area of vexatiousness. Hazel Genn, for example, notes in passing a 'disturbing trend in habitual litigants' (2010, p. 127) while, at the same time, praising the civil justice system for 'providing peaceful, authoritative and coercive termination of disputes' (p. 16).

17 In the last few years, psychiatry has identified a new disorder: Post-Trauma Embitterment Disorder (PTED; see Dobricki and Maercker, 2010; Linden, 2003; Linden, Baumann, Rottet and Shippan, 2007). While I have yet to see 'persistent litigators' associated with this category of disturbance, I would imagine that might be just a matter of time. I thank Yvonne Lawrence for bringing PTED to my attention.

18 De Clerambault Syndrome, also known in the psychiatric literature as 'Erotomania', is usually described as an extreme case of obsessive love leading to paranoia and delusions. Murdie's view is that vexatious litigants exhibit a lesser-known variant of the syndrome involving 'a vehement and passionate attitude with unsustainable claims being made against others' (2002).

19 But see Moorhead, Sefton and Britain's brief discussion (2005).

Genn argues that the civil justice system ‘contributes quietly and significantly to social and economic well-being’ (p. 3) and that ‘the civil courts publicly reaffirm norms and behavioural standards for private citizens’ (p. 3). In this article, I will suggest that while this latter statement is no doubt true, the treatment of vexatious litigants by the courts may allow us to cast a critical eye on the ‘well-being’ claims that Genn and the psychiatric literature emphasise.

Other work touching on related issues suggests repeat litigants are not at all the civil justice norm. For example, Linda Mulcahy’s work on complaints about medical care shows that ‘complaining and claiming’ in response to grievances is rare (2003, p. 85). Ross Cranston’s civil justice study also suggests that the ‘formal adjudication of civil law cases begun is atypical’ (2006, p. 127), and Moorhead, Sefton and Britain (2005) suggest the numbers of ‘obsessive’ and ‘difficult’ litigants are very small. Perhaps more relevant for my purposes here is Richard Moorhead’s empirical work on litigants in person (2003; 2007), as almost all VLs represent themselves.

Moorhead argues that litigants in person suffer worse outcomes in the legal process regardless of the strength of their case (2007, p. 410). His study shows that litigants appearing on their own behalf have a ‘strong perceptual cocktail of unfairness’ (p. 414), and that at least some of this perception is well warranted. Moorhead concludes by arguing that courts ought to engage ‘directly with the litigant’s social world’ (p. 417): ‘... judges need a new aesthetic which is consistent and useful. The existing rituals of civil procedure are upset by an unrepresented party ...’ (p. 421).

Moorhead’s argument seems to me to be a challenge to Genn’s largely positive appraisal of the role of the courts in civil justice. However, I want to use his concluding remarks as a jumping-off point to make a very different argument. What I want to suggest in this article is that VLs do not just upset ‘the existing rituals of civil procedure’, but that exploring how VLs are judged to be obsessive, hopeless and unhappy tells us something about the relationship between injury and English law itself. Before going on to do that, however, I set out some of the contours of who VLs are and what they tend to litigate about.

Mapping the field

At time of writing, there are 190 individuals on the VL list published by the Court Service.²⁰ Although I have not yet been able to find case reports for a number of these, particularly some of the earlier ones, I have found other information about some of them in various media.²¹ Of the 190, just forty-four are women.²² Empirical studies suggest more men than women may turn to civil litigation to solve problems, and this no doubt accounts for some of this discrepancy (see, for example, Sandefur, 2008). This would also partly explain why fewer women engage in repeat litigation and thereby become susceptible to s.42 actions. However, the significantly low numbers of women declared ‘vexatious’ obviously requires further analysis.

The area of vexatious litigation includes several clusters of cases. A number of actions, almost entirely by men, result from divorce and residence disputes;²³ several litigants are incarcerated complaining of their treatment in prison;²⁴ others began their journeys after a perceived injustice

20 www.justice.gov.uk/guidance/courts-and-tribunals/courts/vexatious-litigants/index.htm.

21 All the details of cases I discuss in this article are publicly available.

22 This assessment is based on my reading of litigants’ first names.

23 *AG v. Barker* [2002] EWHC 2324; *AG v. Barrett* [2001] EWHC Admin 808; *AG v. Boothe-Chambers* (unreported, 13 June 2001); *AG v. Day* (unreported, 9 July 1996); *AG v. Haralabidis* (unreported, 28 November 1997); *AG v. Hellyer* [2001] EWHC Admin 174; *AG v. Lowe* (unreported, 14 January 1998); *AG v. Parlett* (unreported, 5 October 1999); *AG v. Saxena* [2003] EWHC 2930; *AG v. Scriven* [2000] WL 389484.

24 *AG v. Ali* [2008] EWHC 1452 (Admin); *AG v. Edwards* [2001] EWCA Civ 1981; *AG v. Walker* 1999 WL 1142750.

committed by a bank, usually following a property dispute.²⁵ Simon Fletcher (the father of actress Susannah York) fought for years against a war-time expropriation of property, and was declared vexatious in 1984 (he remains on the list, despite having died in 2002).²⁶ For several individuals, the instigating event is what they perceived to be an unfair allocation of assets in a will.²⁷ John Yeo, for example, had cared for his elderly male partner for many years, only to find out after his death that his partner's entire estate, including the house in which they lived, had been left to the Twickenham Museum. Mr Yeo commenced a series of 'unmeritorious' actions to prevent his eviction from the house and was declared vexatious in 1999.²⁸

A large cluster of cases (about fourteen or 7.5 per cent of the total) concern litigants with documented histories of mental health problems. This is either described in the s.42 decisions, or elsewhere, for example, in a report from a Mental Health Tribunal. The evidence suggests that, by far, the most common diagnosis is in the area of 'psychotic' disorders, which, according to official statistics, occur at the rate of about 0.05–3 per cent in the population.²⁹ There is evidence in other cases of behaviour that may have brought a litigant into contact with mental health authorities (further on this below). However, as I can find no documentation on this I do not count these amongst the fourteen.

Rather than involving a series of actions that can be traced back to one instigating dispute, the 'mental health' cases tend to follow a different pattern. Paul Benton, for example, who is described as 'happy' to consent to a s.42 order against him, instituted, over a 2-year period, thirty-two claims against diverse parties, including six judges, the prime minister and a chief medical officer for issues to do with the severing of his child's umbilical cord.³⁰ A psychiatric report diagnosed him as having a 'systematised delusional system which may turn out to be resistant to treatment'.³¹ In 1998, Ellen Coupe was referred by a judge for a psychiatric assessment it is not clear she ever received. During the course of her many actions, she sued Railtrack PLC, the judge who decided that case and several other judges and solicitors, as well as medical professionals and the Department of Social Security. In her response to the s.42 proceedings, Ms Coupe accused the Treasury Solicitor of arranging a road traffic accident intended to kill her. She was declared vexatious in 1999.³²

Uday Ratra was declared vexatious in 2003. In a report submitted to the Court by a forensic psychiatrist, he was diagnosed as suffering from 'both a mental illness and a disordered personality'.³³ 'It is likely', Dr McClintock went on, 'that he has paranoid schizophrenia'.³⁴ As the court decided the s.42 application, Mr Ratra was in the process of being sectioned under the

25 *AG v. Alexander* [2003] EWHC 3076; *AG v. Gough* (unreported, 9 May 1996) (appeal, original decision 20 March 1995); *AG v. Hayward* (unreported, 10 November 1995).

26 *AG v. Fletcher* (unreported, 30 July 1984). See also Fletcher's obituary in *The Times* 15 October 2002.

27 *AG v. Abiola* [2006] EWHC 901; *AG v. Rinehart* (unreported, 15 July 1997); *AG v. Roach* (unreported, 2 March 1998); *AG v. Mathew* (unreported, 24 May 1999).

28 *AG v. Yeo* (unreported, 8 December 1999).

29 The 3 per cent figure is for 'black men'; see 'Adult Psychiatric Morbidity in England, 2007', NHS Information Centre for Health and Social Care, 2008: www.ic.nhs.uk/webfiles/publications/mental%20health/other%20mental%20health%20publications/Adult%20psychiatric%20morbidity%2007/APMS%2007%20%28FINAL%29%20Standard.pdf.

30 *AG v. Benton* [2004] EWHC 1952.

31 *Ibid.*

32 *AG v. Coupe* (1999) WL 1400019.

33 *AG v. Ratra* [2003] EWHC 1291 Admin.

34 *Ibid.*, para. 2.

Mental Health Act. Initially, Mr Ratra had experienced an ‘incident’ at the British Museum, ‘the detail of which’, according to Scott Baker LJ, ‘it is unnecessary to go into’.³⁵ Eventually, Mr Ratra launched sixty-six separate actions arising out of this incident, taking in the Museum, the police, police solicitors, a barrister and the Legal Services Ombudsman. Although the forensic psychiatrist had argued that Mr Ratra should have a litigation friend present in court, the judges did not agree as this would ‘leave the door slightly open and be a recipe for trouble’.³⁶

As I mentioned at the outset of the article, there are other cases that I would suggest could be perceived to potentially involve an element of mental illness, although there is no evidence or remark about it. Andrea Brownlie, for example, amongst other claims, sought £1bn damages from ‘the Government’ for ‘destruction of my potential’.³⁷ Barbara Morriss claimed the BBC was ‘listening in’ to her conversations,³⁸ and Sardar Tejendrasingh sued a man (and several lawyers) about a dog, the Director General of the Forensic Science Service about her failure to process evidence, and the *Times Literary Supplement* over their failure to properly advertise his book, *The Creation of the World*.³⁹

In setting the ‘mental health’ cases apart, I do not intend to suggest that I agree with their diagnoses, or even that I draw an inevitable link between their mental health and their litigation histories. Those without mental health evidence in their case reports are often accused of having similar perceptions and behaviours to the ‘delusions’ that the ‘ill’ people are diagnosed with: an obsession with being ‘right’; and a belief in a conspiracy out to get them. It is thus not at all clear from the case reports which came first, the ‘illness’ or the experience of the legal process. In many of the s.42 narratives, it is possible to see the gradual, Kafka-esque deterioration of a litigant as they proceed through the civil justice system.

Although there are many aspects of vexatious litigation worthy of attention, this article is primarily concerned with the (at least) thirty-five vexatious litigants that could be defined as not-white and/or immigrant, a figure that adds up to nearly 20 per cent of the total and more than twice the official count of ‘ethnic minorities’ in the population (7.9 per cent).⁴⁰ In terms of defining, for the purposes of this article, who constitutes a ‘not-white’ litigant, I have gleaned information from several sources. In many instances, this is evident in legal decisions where a judge attaches a particular label to a litigant, such as ‘black’, ‘African’ or ‘Indian’.⁴¹ In other cases, newspapers or online fora either describe the litigant in similar terms or their image is clearly

35 *Ibid.*, para 9. The incident is vaguely described in an earlier case, see [2001] EWHC 1053.

36 *Ibid.*, para 12. See also *AG v. Gill* [2006] EWHC 2917, where the approach of the judges in another case of serious mental health illness was the same. On the courts’ somewhat grudging approach to Mackenzie friends in general, see Moorhead (2003).

37 *AG v. Brownlie* [2007] EWHC 2673.

38 *AG v. Morriss* (unreported, 14 April 1997).

39 *AG v. Tejendrasingh* (unreported, 12 May 1998). See also: ‘The history of the matter is that the plaintiff placed an advertisement in *The Times Literary Supplement* in September 1996 for his book. He claims that the advertisement was defective and his particulars of claim are as follows: “Messing up my add in the TLS of 29 September 1995 with waste of time trouble & expense & racism & messing up my arrangements.” May I say at once that, whatever the circumstances, that is a pleading which would not be acceptable by a very large margin in any court in this country. It is plainly defective and hopelessly embarrassing in that it fails either to clarify the cause of action or the particular nature of the claim’, *Sardar Tejendrasingh ex parte v. Times Supplements Ltd.* [1997] EWCA Civ 1338, per Hirst LJ.

40 www.statistics.gov.uk/cci/nugget.asp?id=455. Note that Jews and Sikhs are not counted as ‘ethnic minorities’ for the purposes of state data collection despite being paradigmatic ethnic groups for the purposes of the Race Relations Act 1976 (now incorporated in the Equality Act 2010); see further discussion in Herman (2011, chapters 6 and 7).

41 This is the case for: Zainab Abiola; Akene Adoke; Krishan Arora; Kay Badibanga; Ismail Bhamjee; Paula Douglas; Glenford and Linbird Green; Asa Singh Khaira; Adekunle Lawal; Esther Mensah; Elahe

‘not-white’.⁴² In the remaining cases, I made a judgment that the litigants were not white based on their names.⁴³ It is a subset of these thirty-five litigants – those whose initiating complaint involved an allegation of racism – that, in the main, I focus on in this article (see further below). For reasons that I hope will become clear, I include, amongst these thirty-five, four that may be officially coded ‘white’ but who are immigrants to the UK (obviously some of the not-white litigants are also immigrants).⁴⁴

In setting out the disproportional numbers of not-white/immigrant litigants as well as those with mental health histories amongst the VLs, I have provided conservative estimates. I suspect the percentages of each are somewhat higher. Of course, these categories overlap, and of the fourteen individuals with documented mental health problems, at least four could be identified as not white. Obviously I am well aware of all the conceptual, theoretical and political problems with counting and labelling people in this way. However, as I hope will become clear shortly, I do not consider these conjunctions coincidental, but rather phenomena worthy of significant exploration.

While there are a number of ways in to the VL field, including, very obviously, gender and mental health analyses, as well as many others, in the remainder of this article I focus on the disproportionate number of cases involving not-white (and, to a lesser extent, immigrant) litigants. This is partly because it is a continuation of work I have been doing in other contexts, but, also, because there is something deeply troubling (to me) about the high proportion of not-white people amongst those declared ‘vexatious’.⁴⁵ This seems a particularly acute concern given research suggesting that non-white litigants are more likely to ‘give up’ civil litigation and receive inadequate legal advice (than ‘white’ ones).⁴⁶ I pursue this concern below by exploring a subset of these cases – those litigants whose ‘initiating incident’ was a complaint of racism.

Mohtasham; Norman Persaud; Ram Saxena; Markandu Sivasubramanian; Basoodeo Sujeen; Sardar Tejendrasingh; and Bridget Wray.

42 Ralston Edwards; Kess Lewis; Andre Salakov; and Delroy Soares.

43 Haider Ali; Azad Amin; Mr Raja (Daisystar); Nader Kohanzad; Alaoma Nnadi; Kojo Owusu-Nyantekyi; KD Orishagbeme; Uday Ratra; Sammy-Joe Rogee (also known as Sammy Jasowa Osaigbovo Ekhaguere); Haroun Van Dari.

44 In these cases, my assessment that the litigant was an immigrant was gleaned from s.42 or other legal decisions. So, we learn that Angelo Perotti’s mother cannot speak English, [2011] EWHC 1294; that Raisa Fradinka is an immigrant from the Ukraine, *AG v. Fradinka* [2004] EWHC 698; and Nicholas Stamoulakatos is originally from Greece (unreported, 7 March 200), para. 1: ‘Mr Stamoulakatos has addressed us in person, in English which was very understandable and we are grateful to him for taking the trouble to speak in what is his second language. He is a man who has come from Greece and spent his early life in Greece. He tells us that he left Greece, I think at the time of the Colonels, being a man who was strongly against that regime, and that he has come and settled in this country.’ Gedaljahu Ebert’s YouTube videos show that he speaks English with a strong accent, www.collaboration.co.uk/MrGEbert/, and elsewhere his nationality is described as ‘Israeli’; see www.levelbusiness.com/doc/person/uk/03140606.

45 When making a s.42 order, it is open to judges to attach to it a penal notice. This would then lead to the imprisonment of a vexatious litigant should they attempt to violate the order. In the research I have done thus far, I can find just three occasions where a penal notice has been attached to a s.42 order. Each one involved a not-white or not-English litigant (Ali; Kumar; Perotti). It seems to me that the urgent need to contain the racialised body through an extra layer of protection – the penal notice – is also something worth pondering further, but I do not pursue this here.

46 See, for example, Pascoe Pleasence, Nigel Balmer, Ash Patel and Catrina Denvir, *Civil Justice in England and Wales 2009*, Report of the 2006–2009 English and Welsh Civil and Social Justice Survey © Legal Services Commission, 2010; O’Grady *et al.* (2005); Mason *et al.* (2009). I have not been able to find any information on how many not-white litigants launch civil actions overall. Sandefur (2008) suggests that no comprehensive study on race and civil litigation exists in North America or Britain.

Race, racism, and judicial narratives of vexatiousness

'The essential vice of habitual and persistent litigation is keeping on and on litigating when earlier litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop.'⁴⁷

From the cases, it is possible to discern several themes expanding on Bingham's 'essential vice' above. In this part of the article, I focus on just two: first, persistence and obsession – refusing to take 'no' for an answer (a stubborn attachment to a perceived injury), which include elements of wildness, unreasonableness, incoherence and incomprehensibility; and second, the hopelessness of the case. Needless to say, there is much overlap between these (and other) different elements of vexatiousness.

Persistent obsession: refusing to take 'no' for an answer

Common to most of the cases is the claim that VLs persist in the face of rejection, developing obsessions about wrongs done to them. VLs refuse to accept the results of their initial appeals, and their continued persistence is taken as evidence of their unreasonableness. As their circle of targets widens, often to lawyers and judges involved in their initial cases, VLs are characterised as obsessive and, even, in one case, 'deranged'.⁴⁸ VLs' insistence on the justness of their cause and their right to continue to seek redress is translated by the courts as an all-consuming 'delusion'. I would not disagree that, in many if not most VL cases, litigation seems excessive. It is perhaps not surprising that judges characterise VLs as obsessed and deluded. However, it is possible to read their persistence in a different light, or, at least, to see that there may be good reasons why 'obsession' may have taken hold. In the cases of not-white/immigrant VLs, in particular, it is possible to see litigants' continued search for justice as something other than pathological.

Akena Adoko, for example, mentioned at the start of this article, was refused permission to qualify as a solicitor on, he believed, racial grounds. The Law Society exempted barristers qualified in England and Wales from the LPC, but refused to recognise Mr Adoko's Ugandan qualification similarly. After he launched a Race Relations Act action, the Law Society eventually did agree to exempt Mr Adoko from exams. However, the Society went on to accuse Mr Adoko of professional misconduct. This early history is mentioned, but buried, in Collins J's s.42 decision.⁴⁹ Mr Adoko went on to sue the Law Society in ten different actions, as well as the lawyers who acted for the Law Society in these proceedings. He also launched several actions against the Lord Chancellor's Department, alleging various forms of corruption, and wrote a book on the subject.⁵⁰

Paula Douglas, described in Lord Kay's s.42 decision as 'being of Afro-Caribbean origin', was studying at the College of Law in Chester when her instructor chose to use the phrase 'nigger in the woodpile' in class.⁵¹ This phrase is not repeated in the s.42 decision, where the judge referred to it as 'a phrase with racial connotations', but can be found in an earlier judgment.⁵² Ms Douglas complained about the instructor's language at the time but did not receive satisfactory redress. She went on to fail her LPC exams, and blamed her failure on the trauma of what Lord Justice Kay referred to in his s.42 judgment as 'that unfortunate incident'. She pursued legal action against the College of Law, the Law Society and firms of solicitors in at least forty-one unsuccessful separate

⁴⁷ *AG v. Barker* [2000] 1FLR 759, para. 22.

⁴⁸ *AG v. Perotti* [2006] EWHC 1002.

⁴⁹ *AG v. Adoko* [2004] EWHC 1409.

⁵⁰ *Ibid.*, see Adoko (2005).

⁵¹ *AG v. Douglas (No2)* [2006] EWHC 1982.

⁵² *AG v. Douglas* (unreported, 18 July 2001).

proceedings, all alleging racial discrimination. Described by the judge as ‘obsessive’, and as someone who ‘will not take “no” for an answer’, Ms Douglas was declared a vexatious litigant in 2006.

Esther Mensah, described in an earlier judgment as ‘a black lady of Ghanaian origin’,⁵³ was declared a vexatious litigant in 2004. She had brought a number of actions against the Royal College of Midwives (and other bodies) for racial discrimination. Ms Mensah had been removed from the ‘banking register’ of midwives for reasons not explained in the Court’s s.42 decision. She was wholly unsuccessful in her repeated attempts to get justice, Auld LJ describing her litigation as ‘vexatious and without reasonable grounds’.⁵⁴

Brothers Glenford and Linbird Green both carried on with legal actions for some years after failing examinations at college; race and sex discrimination complaints forming part of their allegations.⁵⁵ Elahe Mohtasham, who had had an earlier history of race discrimination claims against the NHS, was declared a vexatious litigant in 2005 after a series of actions against Southampton University and her thesis supervisor there.⁵⁶ Krishan Arora, the subject of a s.42 order in 2001, began his wave of litigation in 1990, after a court reduced an award he had won and ordered him to pay the costs of the appeal.⁵⁷ Mr Arora, according to Brooke J’s s.42 judgment, believed there was ‘institutional racism in the courts’, and would ‘never take “no” for an answer’.⁵⁸ Adekunle Lawal, declared vexatious in 2004, had initially made unsuccessful RRA complaints against his employer.⁵⁹ Kay Badibanga, Ralston Edwards, Kess Lewis and Markandu Sivasubramaniam all, also, became ‘persistent’ and ‘obsessed’ litigators after what they believed to be an experience of racism.⁶⁰

For the courts, the refusal to take ‘no’ for an answer becomes evidence of the litigant’s ‘unreasonableness’. According to the judges, the VLs’ continued pursuit of legal remedy is ‘wild’,⁶¹ ‘incomprehensible’,⁶² ‘unintelligible’,⁶³ ‘unreal’⁶⁴ and ‘intemperate’.⁶⁵ Elsewhere, in a different context, I have discussed how judges often understand Jewish legal behaviour as involving elements of obsessiveness, intemperancy and refusals to see sense. Particularly in cases involving Race Relations Act claims, Jewish litigants are described as refusing to ‘let matters rest’, acting ‘strangely’, and as the causes of their own misfortunes.⁶⁶ In *Re P*, a family law case, Butler-Sloss LJ

53 *Mensah v. East Hertfordshire NHT Trust* 1998 WL1042510.

54 *AG v. Mensah* [2004] EWHC 1441, para. 8.

55 *AG v. Green* [2001] EWHC Admin 428.

56 *AG v. Mohtasham* [2006] EWHC 1370.

57 *AG v. Arora* [2001] EWHC Admin 594.

58 *Ibid.*, 54.

59 *AG v. Lawal* [2004] EWHC 816.

60 *AG v. Badibanga* [2003] EWHC 394; *AG v. Edwards*; *AG v. Lewis* [2004] EWHC 2794; *AG v. Sivasubramaniam* [2008] EWHC 852. These are all cases where the litigation instigator is clear in the s.42 decision – there are no doubt other VL cases where racism was an instigator of the litigant’s actions.

61 *AG v. Adoko* [2004] EWHC 1409, 11; *AG v. Ebert* 2000 WL 1544650, 16; *AG v. Perotti* [2006] EWHC 1002.

62 *AG v. Lawal* [2004] EWHC 816, 51.

63 *AG v. Ali* [2008] EWHC 1452, 13.

64 *AG v. Bhamjee* [2003] EWHC 3114.

65 *AG v. Ayouware* [2004] All ER (D) 80; *AG v. Deman* 2006 WL 2524805; *AG v. Salakov* 1999 WL 1319033. For the sake of clarity, Andre Salakov is a black man from Nigeria, see also ‘Swindler Posed as Barrister 200 times’, *Independent*, 20 March 1999 and ‘Legal Advice Fraudster Faces Deportation from Ireland’, *The Post.ie*, 6 July 2003.

66 See discussion in *An Unfortunate Coincidence* (Herman, 2011, chapter 2). This also echoes Goodrich and Mills’s analysis of the Qureshi case: ‘His lack of success was his own doing. His difference was his undoing – the source of his distraction, his digressions, his imagined conflicts, his paranoia’ (2001, p. 36).

tells us that the Jewish parents ‘seem unable to recognise that this issue is decided and cannot be relitigated’.⁶⁷ Although *Re P* was not a s.42 ‘vexatious litigant’ case, the judges viewed these litigants similarly – as unable to see sense and take ‘no’ for an answer. Edaljahu Ebert, a Jewish immigrant from Israel, declared vexatious in 2000, is admonished by his s.42 judges for engaging in a ‘sorry tale of vindictive, misconceived and repetitive litigation ... with a tireless but barren determination’ leading to an ‘extravagant’ waste of resources.⁶⁸

The failure to ‘see sense’ means a failure to adopt the judges’ perspectives on the injury. As Patricia Tuitt has noted in her study of race and law, ‘difference is seemingly inconsistent with reasonableness’ (2004, p. 44). In other words, the VL’s failure to accept ‘the matter’ is over, finished, case closed, is both evidence of their inherent intemperancy and their inability to engage in rational thought. While this characterisation is common to most judicial portraits of vexatious litigants, it has particular resonance when applied to not-white/immigrant ones and may be especially problematic when racism itself has instigated the ‘litigation explosion’ (as I discuss further below).

As I noted earlier in the article, the small literature on VLs largely endorses a picture of the vexatious litigant as out of control. The forensic psychiatry field, with very few exceptions, insists ‘querulous’ litigants must have their ‘delusions’ managed by professionals. This literature proceeds on the assumption that the ‘wrong’ done to the litigant is ‘imagined’. However, if many VLs begin their litigation behaviour after an experience of perceived racism, then perhaps more attention needs to be paid to Richard Moorhead’s argument that courts ought to engage ‘directly with the litigant’s social world’ (2007, p. 407). Sara Ahmed, for example, has written:

‘... I do have a kind of paranoid anxiety about things that do and could happen. I am never sure, when *x* happens, whether *x* is about racism or is a result of racism. I am never sure. And because I am never sure, then *x* is lived as possibly about racism, as being what explains how you inhabit the world you do. Racism creates paranoia, that’s what racism does.’ (2010, p. 84)

Perhaps it is possible to see the VL’s failure ‘to let go’ as a kind of presentness – in other words, rather than turning away from and burying the experience of racism in a hurtful memory, which is what many who experience it do much of the time, VLs’ ‘obsession’ and ‘persistence’, so deplored by the judges, could, instead, be reconceived as a ‘passion for justice’. Rather than exhibiting a lack of reason, some litigants may in fact possess a counter or alternative rationality.⁶⁹ In other words, by failing to ‘take no for an answer’ they insist on holding institutions to account for what they believe to be racist practices.⁷⁰ Given this, in a sense, ‘higher purpose’, it is not at all unreasonable for VLs to persist in taking legal action, despite consistently losing their cases. I develop this argument further below; for now, I turn to my second theme – hopelessness.

67 See discussion in *An Unfortunate Coincidence* (Herman, 2011, chapters 4 and 5).

68 *AG v. Ebert* 2000 WL 1544650, 3. See also *AG v. Ebert* [2001] WL 1040181, where a subsequent court imposed further restrictions on Gedaljahu Ebert, including that he not come on to court premises other than to attend a hearing, and also [2005] EWHC 1254 (Admin), where Brooke LJ imposed further restrictions, including that he not communicate with the courts other than every six years and no more than twice a year. These further orders have not prevented Ebert from continuing his campaign against what he perceives to be corruption in the legal system, see e.g. www.collaboration.co.uk/MrGEbert/.

69 See also Gould (2010) on ‘non-rational’ vs. ‘irrational’ affect; and Cooper (2009) on counter vs. alter normativity.

70 Keith J gives as evidence of Omorotu Ayovuare’s lack of reason: ‘Mr Ayovuare regards all institutions with which he comes into contact as infected by racism’, *HM AG v. Ayovuare* 2003 WL 23145262.

Hopelessness

Linked to judges' disapproval of VLs' persistence and obsession is their understanding that the VLs' cases are hopeless. Ismail Bhamjee, Gedaljahu Ebert, Elahe Mohtasham and Angelo Perotti, for example, are all described by judges as having/being 'hopeless' cases. It is the persistence in the face of this hopelessness that the courts find so hard to fathom, and that becomes evidence of unreasonableness. Gedaljahu Ebert, for example, is 'unable to appreciate the hopelessness of any further process'.⁷¹

VL litigation, by definition, is hopeless, as if there was any prospect of legal success the judges are sure the litigants would have had some by now. Linked to the hopelessness of the litigation is the judge's view that it is all extremely wasteful. Waste, particularly of court resources, is one of the key elements of vexatiousness. But if it were not for the hopelessness of the litigation (surely a comment on its meritoriousness), then the courts, presumably, would not be as concerned about 'waste'. But 'hope', and the link made between hope and waste, is curious in this context. Judges, understandably of course, mean something very specific when they talk about 'hope': the prospect of legal success. In this sense, hopeless litigation is, by definition, vexatious: 'The bringing of a series of actions which have no prospect of success is itself a sign of vexatious conduct.'⁷² The litigant's hopeless history is proof of their current and future status as a VL.

In some cases, judges link the litigant's 'hopelessness' to using the legal system for 'campaigning' purposes (as if that was something unusual). This is particularly the case in 'restriction of proceedings orders' (s.33 cases) under the Employment Tribunals Act.⁷³ Omorotu Ayovuare, a property surveyor described by Keith J as a 'black African',⁷⁴ used the 'intemperate language of racism' to criticise decisions in his actions.⁷⁵ In various press reports, all of them expressing outrage at Mr Ayovuare's excesses, he made it clear that he was using the legal system to campaign against 'institutional racism'.⁷⁶ The judges in his s.33 case viewed things similarly.

'We refer to the history of his litigation as a "campaign" because, to use the words of Mr Adam Tolley for the Attorney General in his skeleton argument, "[t]here are clear indications that Mr Ayovuare perceives himself to be fighting single-handedly against what he regards as unbridled racism in society in general and that he treats litigation as his weapon in that 'war' ...".'⁷⁷

Suresh Deman, originally from India, came to the UK via the US where he had successfully won a race discrimination action against the University of Pittsburgh. According to the EAT in his s.33 case, Mr Deman was 'pursuing a campaign to demonstrate what he believed was discrimination in the world of higher education ... It seems to us that litigation has to a considerable extent become an end in itself'.⁷⁸

⁷¹ *AG v. Ebert* 2000 WL 1544650, para. 49.

⁷² *AG v. Covey* (unreported, 19 February 2001).

⁷³ As I explained briefly earlier in the article, s.33 allows Employment Appeal Tribunals to impose limited time orders preventing individuals from launching any further actions in the tribunal system. The jurisprudence borrows from s.42 cases.

⁷⁴ *AG v. Ayovuare* [2003] WL 23145262, para. 2.

⁷⁵ *Ibid.*, para 22. It seems here that making an accusation of racism is itself intemperate.

⁷⁶ H. Emmanuel, 'It's Not Just Black and White', *Property Week*, 4 July 2003; A. Lusher and D. Bamber, 'Give Me a Job – or I'll Sue', *Telegraph*, 8 June 2003; A. Lusher, 'Attorney General Bans Race Litigant after 82 Cases', *Telegraph*, 23 November 2003.

⁷⁷ *AG v. Ayovuare* [2003] WL 23145262, para. 21.

⁷⁸ *AG v. Deman* [2006] WL 2524905, para. 172.

Mr Deman was also the target of negative press for his endeavours.⁷⁹ Sundarsanan Kuttappan practised law in Kerala before moving to England in 1987, where he then worked as ‘a security officer, a financial consultant, a trainee conductor with British Rail and an administrative assistant with Customs’.⁸⁰ According to the EAT, Mr Kuttapan’s litigation was to pursue an ‘equality campaign rather than to obtain redress for a genuine grievance’.⁸¹

But is campaigning against racism proof of ‘hopelessness’ or abuse of process and is continued litigation pursuit of a ‘delusion’? Arguably, it is not that VLs cannot grasp reality but that they refuse to accept reality’s presumptions. As McGeer (2004) has argued, perhaps the ‘rationality’ of hope – the likely prospect of any particular hope’s realisation – is not the question. If hope involves longing, dreaming (Layoun, 1997), is in some sense ‘utopian’ (Levitas, 1990, chapter 4), and seeks to bring about that which is hoped for, then perhaps these ‘race campaigners’ are not ‘hopeless cases’ at all (see also Smith, 2007).

Hope is about more than the rational assessment of legal prospects. Hope is also about aspiration, desire, needs and wants. Many VLs appear to recognise quite clearly that the legal system is unlikely to deliver justice in their cases. They are prepared to go on despite this particular lack of hope. Instead, they may have other kinds of hope they are pursuing. If you believe that the legal system is infected by institutional racism, you are unlikely to believe that you will achieve legal victories based on complaints of racism. You might, indeed, be hopeless about these prospects. However, it is clear from the case reports that some litigants persevere despite this particular lack of hope. They may be hopeful that their continued legal failures will confirm their analysis of the legal system’s institutionalised racism, or that a judge might, one day, see sense. For the VL, it is the judges’ refusal to acknowledge instances of racism that constitutes the failure of reason.

The melancholic litigant

‘The background to this matter is long, complicated and melancholy.’⁸²

For some judges, the VL is a tragic figure. Paula Douglas, who sat in a class at the Chester College of Law while her instructor used the expression ‘nigger in a woodpile’, is described by Kay J as having an ‘old sad history’. But it is not her experience of gross racism that is sad. Kay J never even reproduces the woodpile phrase, calling it, instead, ‘an old-fashioned and now disapproved expression with racial connotations’.⁸³ Ms Douglas is, instead, a sad victim of her own ‘obsession’.⁸⁴ Simon Brown LJ has this to say about Gedaljahu Ebert: ‘... he will leave this court with an aggravated sense of injustice; but it is a melancholy fact that that is usually the case with truly vexatious litigants.’⁸⁵ It seems that it is the litigant’s profound, but in the eyes of the court misplaced, attachment to their perceived injury that is at the root of judicial unease. It is worth probing this sadness, melancholia and unhappiness more deeply. Sara Ahmed writes:

‘... racism becomes readable as what the melancholic migrant is attached to, as an attachment to injury that allows migrants to justify their refusal to participate in the national game ... By

79 N. Craven, ‘The Race Claims Goldrush’, *Daily Mail*, 14 June 2003; also P. Baty, ‘Whistleblowers: Serial Litigant Accuses Race Council of Racism’, *Times Higher Education*, 15 November 2002.

80 *AG v. Kuttapan* 2005 WL 3635196, para. 9.

81 *Ibid.*, para. 77.

82 *AG v. Perotti* [2006] EWHC 1002, Rix J.

83 *AG v. Douglas (No2)* [2006] EWHC 1982, Para. 2.

84 *Ibid.*, para. 30.

85 *Ibid.*, para. 49.

implication, it is the repetition of the narrative of injury which causes injury: the migrants exclude themselves if they insist on reading their exclusion as a sign of the ongoing nature of racism . . . The moral task is thus “to get over it”, as if when you are over it, it is gone.’ (2010, p. 143)

In the final part of the article, I want to consider further the not-white/immigrant litigant’s failure ‘to get over it’. I want to put forward the argument that this failure to ‘move on’, this ‘attachment to injury’, is in fact a significant act of resistance to institutionalised racism.

Work by Jonathan Flatley (2008) and Anne Cheng (2001), amongst others (see also Parikh, 2003; Suzuki, 2006), attempts to recuperate melancholia as an essential element of resistance to and engagement with structures of power.⁸⁶ Flatley, drawing from Benjamin, argues for a

‘. . . politicizing, splenetic melancholy, where clinging to things from the past *enables* interest and action in the present world and is indeed the very mechanism for that interest . . . For Benjamin, the structure of revolutionary consciousness is necessarily melancholic; and, conversely, melancholia contains within it a revolutionary kernel.’ (2008, pp. 65, 74)

This is what Flatley ultimately hopes to advocate – an ‘antidepressant melancholia’ (2008, p. 107), where action in the world is ‘motivated most by the possibility of returning to and redeeming past losses and repairing past wrongs’ (p. 151): the very promise, of course, afforded by law.

Cheng asks not ‘how should people “get over” their injury’, but, rather, what does it mean ‘for social, political, and subjective beings to *grieve*?’ (2001, p. 7). She describes melancholia as a ‘strategy’ for both the racialised subject, but also, importantly, for the racially dominant who *require* the racialised other to sustain racial hierarchies. Whiteness, Cheng argues, is melancholic as it is ‘based on psychical and social consumption-and-denial’ (pp. 11–12). David Eng and Shinee Han similarly argue that racial melancholia needs to be understood as ‘*conflict* rather than *damage*’ (2003, p. 363).⁸⁷

In the case of many (not all) not-white VLs, the law’s failure to resolve past instances of racism is what motivates their present struggle as well as underpins their future hopes. The injunction to ‘get over it’ is a command to resign oneself to things as they are, to withdraw from the field of contestation. If we understand the VLs’ mood as one of ‘melancholic attachment’ or, in Avery Gordon’s (1997) terms, ‘haunting’ (rather than ‘obsession’ or ‘delusion’),⁸⁸ and see the ‘revolutionary kernels’ in melancholia, then, perhaps, we can also begin to understand some aspects of ‘vexatious litigation’ as a kind of ‘melancholic agency’ that underlies much social and political action (Suzuki, 2006, p. 37). This, I take it, is what Sara Ahmed means when she writes: ‘We must stay unhappy with this world’ (2010, p. 105).

But VLs may have attachments to more than ‘just’ the racism they have encountered – they also display a significant attachment to law. This attachment may also be melancholic, in the sense that VLs persist in attempting to recover what they have lost: justice. Psychoanalytic perspectives on melancholia are not the only lens through which to understand these dynamics. Organisational theory and social psychology also seek to explain what motivates people to ‘complain’.⁸⁹ There is

86 For a discussion of the historical genealogy of melancholia more generally, see Radden (2000).

87 See also Munoz, (1999, p. 74); Cvetkovich, (2003, pp. 45 – 47, 165). There is also a wider literature on *affect* that is relevant here; see e.g. Clough and Halley (2007); Sedgwick (2002).

88 ‘Haunting’ in the sense that it is the original incident of racism (and all the other racisms that these litigants have no doubt endured) that remain spectral in the s.42 decisions, referred to, for example, as ‘an incident at the British Museum’, or ‘an old-fashioned phrase with racial connotations’.

89 See Fineman (2000). The ‘law and emotions’ literature would be another way in to some of this material. For a recent review of this field, see Abrams and Keren (2010). See also Maroney (2006).

a huge literature here on perceptions of justice at work, for example, arguing that unfairness drives action that is often positive and reparative, even if partly motivated by 'revenge' (Aquino, Tripp and Bies, 2006).⁹⁰

But, for the courts, the VL's attachment to justice proves 'too hot to handle' (Tripp, Bies and Aquino, 2007). Although law encourages the pursuit of grievance, this must not be to excess. The VL is both 'devoured' by their perceived injustice⁹¹ and voraciously, at the same time, overconsumes the law. Erin Suzuki has written of how raced subjects can 'overconsume' white culture; it may appear as though their hunger cannot be satisfied (2006, p. 40). In other words, racial melancholia can lead to assimilation strategies of 'excessive' consumption. These strategies are not successful because raced subjects do not 'become white' by consuming dominant culture; on the contrary, the very excesses of their consumption become evidence of their assimilative failure. VLs' 'persistent', 'obsessive' and 'hopeless' legal pursuits can thus be read in this light – as strategies of assimilation that never work, because they cannot work. In the end, VLs must themselves be gagged – forever. The finality of a s.42 order recognises that the law will never be able to cope with, much less address, the litigant's injuries – but does so through a projection that attaches the 'hopelessness' to the vexatious litigants themselves.

But melancholic litigants are accompanied on their journeys by haunted, melancholic judges. In s. 42 cases, judges are despairing, weary and sorrowful.⁹² They are melancholic about the VLs, but they are also 'hopeless' about the impossibility of justice on these occasions for justice requires 'good losers'. As Simon Brown J remarked about *Edaljahu Ebert*: '... he will leave this court with an aggravated sense of injustice; but it is a melancholy fact that that is usually the case with truly vexatious litigants.'⁹³ 'Truly vexatious' litigants will always and forever remain aggrieved – they will never get over the law's failure to deliver, and, for the judges, this is very sad. Unlike the VLs, however, whose melancholy, in many cases, fuels resistance, judicial melancholy seems to signify both resignation and genuine bewilderment.

Concluding remarks

Not-white litigants should be under not overrepresented in the VL group, given data suggests they 'do nothing' about their problems more often than white people (Mason and Hughes, 2009; O'Grady *et al.*, 2005). If not-white litigants are disproportionately identified for s.42 orders there is something wrong going on. I am not suggesting that the Attorney General seeks out not-white and/or immigrant litigants to prosecute. I am suggesting that the English civil justice system finds something particularly unsettling about the behaviour, moods and emotional registers of not-white/immigrant litigants that may leave them more vulnerable to 'vexatious litigant' prosecution. As huge cuts to civil legal aid bite, most certainly leading to more litigants in person, this concern is perhaps even more pressing.⁹⁴

The point of this article has not been to provide a defence of vexatious litigation, or to romanticise the vexatious litigant. I have no wish to fetishise melancholy any more than happiness, and I would not wish to be on the receiving end of litigation that could qualify as vexatious. What I have sought to do here is provide a map of an area of law that has been left largely unremarked upon, much less theorised, and to provide a reading of cases involving not-white/immigrant litigants, as these

⁹⁰ See also Harlos and Pinder (2000).

⁹¹ 'This injustice or perceived injustice has so devoured him', *AG v. Ebert* 2000 WL 1544650, 16.

⁹² Peter Goodrich has written that melancholia is 'the essential condition of the common lawyer' (1993, p. 382).

⁹³ *AG v. Ebert* 2000 WL 1544650, para. 49.

⁹⁴ See for example: www.lawgazette.co.uk/news/litigants-person-set-rise and www.guardian.co.uk/law/2011/jun/06/legal-aid-cuts-chaos-courts/print.

feature so prominently on the official list. I have argued that a focus on the litigant's pathologies occludes an understanding of the broader social and political context within which such litigation, at times, arises. Even if we wish to endorse psychiatric explanations, we must at the very least understand such affects as 'anger' and 'paranoia' as having roots in 'real' experiences of racism (Brown, 2003; Carter and Forsyth, 2009; Sheppard, 2002). Instead, I have argued that VLs can be read as passionate actors exhibiting high degrees of positive agency and oppositional or alternative rationalities.

Despite judges' attempts to put an end to what cannot be got over, many litigants refuse to accept that a s.42 order terminates their pursuit of justice. In the case transcripts, vexatious litigants make it clear they intend to be back: 'Give me my documents and thank you for your lawlessness and we will be continuing. We take our side, our fight.'⁹⁵ VLs return to court on their behalf and, occasionally, as Mackenzie friends on behalf of others.⁹⁶ They blog, post YouTube videos, organise protests, and participate in online 'victims of injustice' communities.⁹⁷ While this persistence could be read as further evidence of their pathology, I prefer to see their continued failure to give up in a more positive light – as evidence of their commitment to the ideals of justice.

Mr Green: Excuse me, sir, am I allowed to speak before this hearing closes?

Lord Justice Laws: Stand up, Mr Green. What do you want to say?

Mr Green: I am the person here and I was ignored and you spoke to Mark Bishop. I was wondering –

Lord Justice Laws: What do you want to say?

Mr Green: I was asking, am I allowed to speak?

Lord Justice Laws: Well, we have given our judgments. The case is over so far as this court is concerned. What do you want to say?

Mr Green: Well, I thought that was a bit unusual because you only spoke to Mark Bishop and you just ignored me.

Lord Justice Laws: Well, Mr Bishop was indicating that I should make a correction in the judgment, which I will certainly do.

Mr Green: I think I will be making a complaint about that.

Lord Justice Laws: Thank you.

(end Transcript)⁹⁸

References

- ABRAMS, K. and KEREN, H. (2010) 'Who's Afraid of Law and the Emotions?', *Minnesota Law Review* 94, 1997–2136.
- ADOKO, A. (2005) *The Most Corrupt British Judges*. London: London Truth Publishers.

⁹⁵ Raisa Fradinka, transcript, in *AG v. Fradinka* [2004] EWHC 698, para 19.

⁹⁶ For example, Angelo Perotti appeared as a litigation friend to his mother's action in [2011] EWHC 1294 (Admin); Terence Ewing appeared for Margarita and Thomas O'Neill (see O'Doherty, 2002).

⁹⁷ Bernice Brookner continued to sit in court observing various proceedings, see 'Fondling, Fraud and Feminism – Just Another Day in Camden', *Independent*, 16 May 1998. After his s.42 order, Andre Salakov moved his 'legal practice' to Ireland from where he was eventually deported; see 'Legal Advice Fraudster Faces Deportation from Ireland', *The Post.ie*, 6 July 2003. Gedaljahu Ebert continues to organise protests against political and legal corruption: see www.collaboration.co.uk/MrGEbert/. Online communities of litigants include: <http://victims-unite.net/advice/litigants-in-person/>; <https://mrebert.wordpress.com/about/>; www.vexatiouslitigant.org/vex_litigant_homepage.html.

⁹⁸ *AG v. Green* [2001] EWHC Admin 428.

- AHMED, S. (2010) *The Promise of Happiness*. Durham, NC: Duke University Press.
- AQUINO, K., TRIPP, T. M. and BIES, R. J. (2006) 'Getting Even or Moving On? Power, Procedural Justice, and Types of Offense as Predictors of Revenge, Forgiveness, Reconciliation, and Avoidance in Organizations', *Journal of Applied Psychology* 91(3): 653–68.
- BROWN, T. N. (2003) 'Critical Race Theory Speaks to the Sociology of Mental Health: Mental Health Problems Produced by Racial Stratification', *Journal of Health and Social Behavior* 44(3): 292–301.
- CARTER, R. T. and FORSYTH, J. M. (2009) 'A Guide to the Forensic Assessment of Race-Based Traumatic Stress Reactions', *Journal of the American Academy of Psychiatry and the Law Online* (37)1: 28pp.
- CHENG, A. A. (2001) *The Melancholy of Race: Psychoanalysis, Assimilation, and Hidden Grief*. Oxford: Oxford University Press.
- CLOUGH, P. T. and HALLEY, J. O. (eds) (2007) *The Affective Turn: Theorizing the Social*. Durham, NC: Duke University Press.
- COLBY, C. (2000) 'There's a New Sheriff in Town: The Texas Vexatious Litigants Statute and Its Application to Frivolous and Harassing Litigation', *Texas Tech Law Review* (31): 1291–352.
- COOPER, D. (2009) 'Caring for Sex and the Power of Attentive Action: Governance, Drama, and Conflict in Building a Queer Feminist Bathhouse', *Signs* (35)1: 105–130.
- CRANSTON, R. (2006) *How Law Works: The Machinery and Impact of Civil Justice*. Oxford: Oxford University Press.
- CVETKOVICH, Ann (2003) *An Archive of Feelings: Trauma, Sexuality, and Lesbian Public Cultures*. Durham, NC: Duke University Press.
- DANIEL, J. O. and MOYLAN, T. (eds) (1997) *Not Yet: Reconsidering Ernst Bloch*. London: Verso.
- DOBRICKI, M. and MAERCKER, A. (2010) '(Post-Traumatic) Embitterment Disorder: Critical Evaluation of its Stressor Criterion and a Proposed Revised Classification', *Nordic Journal of Psychiatry* (64)3: 147–52.
- ENG, D. L. and HAN, S. (2003) 'A Dialogue on Racial Melancholia', in D. L. Eng and D. Kazanjian (eds), *Loss: The Politics of Mourning*. Berkeley: University of California Press, 343–71.
- ENG, D. L. and KAZANJIAN, D. (eds) (2003) *Loss: The Politics of Mourning*. Berkeley: University of California Press.
- FINEMAN, S. (2000), *Emotion in Organizations*. New York: Sage.
- FLATLEY, J. (2008) *Affective Mapping: Melancholia and the Politics Of Modernism*. Cambridge, MA: Harvard University Press.
- FRECKELTON, I. (1988). 'Querulent Paranoia and the Vexatious Complainant', *International Journal of Law and Psychiatry* 11: 127–43.
- GENN, H. G. (2010) *Judging Civil Justice*. Cambridge: Cambridge University Press.
- GOLDSTEIN, R. L. (1987) 'Litigious Paranoids and the Legal System: The Role of the Forensic Psychiatrist', *Journal of Forensic Sciences* 32(4): 1009–1015.
- GOODRICH, P. (1993) 'Oedipus Lex: Slips in Interpretation and Law', *Legal Studies* 13(3): 381–95.
- GOODRICH, P. and MILLS, L. G. (2001) 'The Law of White Spaces: Race, Culture, and Legal Education', *Journal of Legal Education* 51: 15–38.
- GORDON, A. (1997) *Ghostly Matters: Haunting and the Sociological Imagination*. Minneapolis: University of Minnesota Press.
- GOULD, D. (2010) 'On Affect and Protest', in J. Staiger, A. Cvetkovich and A. Reynolds (eds), *Political Emotions: New Agendas in Communication*. London: Routledge, 18–44.
- HARLOS, K. P. and PINDER, C. C. (2000) 'Emotion and Injustice in the Workplace', in S. Fineman (ed.), *Emotion in Organizations*. Los Angeles: Sage Publications Ltd, 255–76.
- HERMAN, D. (2011) *An Unfortunate Coincidence: Jews, Jewishness, and English Law*. Oxford: Oxford University Press.

- KIRBY, N. (2009) 'When Rights Cause Injustice: A Critique of the Vexatious Proceedings Act 2008 (NSW)', *Sydney Law Review* 31: 163.
- LAYOUN, M. (1997) 'A Small Reflection on a Dream Thrice Removed of Hope from a Refugee Camp' in J. O. Daniel and T. Moylan (eds), *Not Yet: Reconsidering Ernst Bloch*. London: Verso, 224–32.
- LESTER, G. and SMITH, S. (2006) 'Inventor, Entrepreneur, Rascal, Crank or Querulent?: Australia's Vexatious Litigant Sanction 75 Years On', *Psychiatry, Psychology and Law* 13: 1–27.
- LEVITAS, R. (1990) *The Concept of Utopia*. London: Peter Lang.
- LINDEN, M. (2003) 'Posttraumatic Embitterment Disorder', *Psychotherapy and Psychosomatics* 72(4): 195–202.
- LINDEN, M., BAUMANN, K., ROTTER, M. and SCHIPPAN, B. (2007) 'The Psychopathology of Posttraumatic Embitterment Disorders', *Psychopathology* 40(3): 159–65.
- MARONEY, T. A. (2006) 'Law and Emotion: A Proposed Taxonomy of an Emerging Field', *Law and Human Behavior* 30(2): 119–42.
- MASON, P. and HUGHES, N. (2009) *Access to Justice: A Review of Existing Evidence of the Experiences of Minority Groups Based on Ethnicity, Identity and Sexuality*. London: Ministry of Justice Research Series 7/09.
- MCGEER, V. (2004) 'The Art of Good Hope', *Annals of the American Academy of Political and Social Science* 592(1): 100–127.
- MOORHEAD, R. (2003) 'Access or Aggravation: Litigants in Person, McKenzie Friends and Lay Representation', *Civil Justice Quarterly* 22: 133–55.
- MOORHEAD, R. (2007) 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality', *Social & Legal Studies* 16: 405–424.
- MOORHEAD, R., SEFTON, M. and BRITAIN, G. (2005) *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*. London: Department for Constitutional Affairs.
- MULCAHY, L. (2003) *Disputing Doctors: The Socio-Legal Dynamics of Complaints about Medical Care*. Maidenhead: Open University Press.
- MULLEN, P. E. and LESTER, G. (2006) 'Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour', *Behavioral Sciences & the Law* 24(3): 333–49.
- MURDIE, A. (2002) 'Vexatious Litigants and de Clerambault Syndrome', *New Law Journal* 152: 61–62.
- O'DOHERTY, S. (2002) 'Vexatious Litigants', *Justice of the Peace* 166(32): 619–21.
- O'GRADY, A., BALMER, N., CARTER, B., PLEASENCE, P., BUCK, A. and GENN, H. (2005) 'Institutional Racism and Civil Justice', *Ethnic and Racial Studies* 28(4): 620–28.
- PARIKH, C. (2003) 'Blue Hawaii: Asian Hawaiian Cultural Production and Racial Melancholia', *Journal of Asian American Studies* 5(3): 199–216.
- RADDEN, J. (ed) (2000) *The Nature of Melancholy: From Aristotle to Kristeva*. Oxford: Oxford University Press.
- ROWLANDS, M. W. (1988) 'Psychiatric and Legal Aspects of Persistent Litigation', *British Journal of Psychiatry* 153: 317–23.
- SANDEFUR, R. L. (2008) 'Access to Civil Justice and Race, Class, and Gender Inequality', *Annual Review of Sociology* 34(16): 1–20.
- SCHILLER, E. and WERTKIN, J. A. (2000) 'Frivolous Filings and Vexatious Litigation', *Georgetown Journal of Legal Ethics* 14: 909.
- SEDGWICK, E. K. (2002) *Touching Feeling: Affect, Pedagogy, Performativity*. Durham, NC: Duke University Press.
- SHEPPARD, M. (2002) 'Mental Health and Social Justice: Gender, Race and Psychological Consequences of Unfairness', *British Journal of Social Work* 32(6): 779–97.
- SMITH, S. (1989) 'Vexatious Litigants and their Judicial Control—The Victorian Experience', *Monash University Law Review* 15: 48–67.

- SMITH, S. (2007) 'Constance May Bienvenu: Animal Welfare Activist to Vexatious Litigant', *Legal History* 11: 31.
- SORABJI, J. (2005) 'Protection from Litigants who Abuse Court Processes', *Civil Justice Quarterly* 24: 31–36.
- STAIGER, J., CVETKOVICH, A. and REYNOLDS, A. (eds) (2010) *Political Emotions*. New York: Routledge.
- STÅLSTRÖM, O. W. (1980) 'Querulous Paranoia: Diagnosis and Dissent', *Australian and New Zealand Journal of Psychiatry* 14(2): 145–50.
- STAUBER, A. (2008) 'Litigious Paranoia: Confronting and Controlling Abusive Litigation in the United States, the United Kingdom, and Australia', *International Review of Business Research Papers* 4(4): 45–61.
- SUZUKI, E. (2006) 'Consuming Desires: Melancholia and Consumption in "Blu's Hanging"', *MELUS* 31(1): 35–52.
- TAGGART, M. (2004) 'Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896', *Cambridge Law Journal* 63(03): 656–84.
- TRIPP, T. M., BIES, R. J. and AQUINO, K. (2007) 'A Vigilante Model of Justice: Revenge, Reconciliation, Forgiveness, and Avoidance', *Social Justice Research* 20(1): 10–34.
- TUITT, P. (2004) *Race, Law, Resistance*. London: GlassHouse.
- UNGVARI, G. S. and HOLLOKOI, R. (1993) 'Successful Treatment of Litigious Paranoia with Pimozide', *Canadian Journal of Psychiatry* 38(1): 4–8.
- UNGVARI, G. S., PANG, H. T. A. and CHIU, F. K. H. (1995) 'Delusional Disorder, Litigious Type', *Clinical Gerontologist* 16(2): 71–73.